ESTATE OF EDNA TURNEY

IBLA 91-30 Decided july 20, 1992

Appeal from a decision of the Colorado State Office, Bureau of Land Management, finding issuance of patent under Color of Title Act not warranted.

Affirmed.

1. Color or Claim of Title: Generally--Indians: Lands: Ceded Lands: Restoration

Issuance of patent under the Color of Title Act, as amended, 43 U.S.C. §§ 1068-1068b (1988), is not warranted if the land was restored to tribal ownership prior to when the color-of-title claimant's chain of title was initiated.

APPEARANCES: Kenneth A. Senn, Esq., Pagosa Springs, Colorado, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Estate of Edna Turney (Estate) has appealed from a September 7, 1990, decision of the Colorado State Office, Bureau of Land Management (BLM), finding issuance of a patent under the Color of Title Act, as amended, 43 U.S.C. §§ 1068-1068b (1988), to the heirs or assigns of Antonio Lucero unwarranted. 1/

1/ The September 1990 BLM decision is a letter to the Colorado Land Title Company (Title Company), replying to a July 6, 1990, letter from that company asserting that, although there was no evidence of a patent from the United States, "[a patent] should have been and therefore should be [issued]" because of the longstanding private ownership of the land. The Title Company apparently insured the title when the Turney Estate conveyed the land to the Sivers and Corrigan Partnership. The Turney Estate indicates that its interest in the present proceedings is as the "grantor and warrantor" (Supplemental Statement of Reasons for Appeal (Supp. SOR) at 1).

On May 4, 1899, Lucero applied for a homestead entry, seeking the NE¼ NE¼ and the W½ NE¼ sec. 32, T. 33 N., R. 2 W., New Mexico Principal Meridian, Archuleta County, Colorado. His application was assigned serial No. 1520. On October 10, 1904, he submitted final proof for homestead entry No. 1520, and Homestead Certificate No. 890 was issued to him on October 24, 1904. Patent was issued on March 30, 1905.

On October 10, 1904, the same day that he filed the final proof for application No. 1520, Lucero prepared an application for an additional homestead entry, pursuant to section 2 of the Act of April 28, 1904, ch. 1776, 33 Stat. 527. This application described the land involved in this appeal -- a 40-acre parcel described as the SE¼ NW¼ sec. 32, in the same township and range as his initial homestead entry. Lucero filed this application for the additional homestead entry 14 days later (October 24, 1904), and it was assigned serial No. 3016. 2/ During the 14-day period between preparing application No. 3016 and filing it, Lucero conveyed the land described in application No. 1520 and the 40-acre parcel described in application No. 3016 to Thomas Jones. BLM states that "[t]here is no indication in [BLM] records, or those of Archuleta County, that any subsequent action was taken by Antonio Lucero to obtain patent, nor have we found any evidence of a patent" (Memorandum from the Deputy State Director, Lands and Renewable Resources, Colorado State Office, BLM, to the Regional Solicitor, dated July 17, 1990, at 1). 3/

In its September 1990 decision, BLM held that Lucero's heirs or assigns do not hold a valid Class 2 claim entitling them to a color-of-title patent to the 40-acre parcel because their color of title does not date from a conveyance made on or before January 1, 1901, as required by 43 U.S.C. § 1068 (1988). 4/ The basis for its finding that the heirs or assigns have no Class 1 claim was that the land was never cultivated and

2/ Section 2 of the Act of Apr. 28, 1904, was codified, as amended in 1950, at 43 U.S.C. § 213 (1970). The Act was repealed on Oct. 21, 1976, pursuant to section 702 of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2787.

3/ The Title Company is also of the opinion that the SE¼ NW¼ sec. 32 was never patented. In a July 6, 1990, letter to BLM, the Title Company noted the Oct. 18, 1904, conveyance from Lucero to Jones, and states: "Chain of title from said Thomas Jones to present is complete therefore there is a chain of title for private ownership of subject property except for the patent. Our search of the public records discloses no recorded patent. I do feel that no patent was issued * * *." (Emphasis added.)

4/ BLM concluded that the "successors in interest" to Lucero's additional homestead entry No. 3016 are not entitled to patent under section 2 of the Act of Apr. 28, 1904, because Lucero was not the owner of the contiguous homestead parcel on Oct. 24, 1904, when he applied for the additional homestead entry. We agree. See 33 Stat. 527 (1904); Circular, 32 L.D. 639, 640 (1904).

improved, as required by 43 U.S.C. § 1068 (1988), and that the parcel is within the boundaries of the Southern Ute Indian Reservation and presumed to be Indian Land. The Estate appealed from the September 1990 BLM decision.

In its SOR, as supplemented by a February 7, 1991, letter, 5/ the Estate contends that it is entitled to a color-of-title patent to the land described in application No. 3016 because of a chain of title dating from October 24, 1904, and continuing, by several mesne conveyances, to the Estate's immediate predecessor-in-interest, Edna Turney. The Estate asserts that Turney had been in possession of and paid taxes on the land since May 9, 1952, when she was assigned a "Treasurer's Sale Certificate" by Archuleta County. The Estate further notes that Turney later received a "Treasurer's Deed" from the county on September 19, 1952. The Estate argues that Turney held "lawful title" under Colorado law, which provides that "a person in possession who has lawfully paid taxes for a period of seven years shall be presumed to hold lawful title" (Supp. SOR at 1).

The Estate is incorrect when it claims a right to title under the Color of Title Act because it is a successor-in-interest to the patentee of the SE¼ NW¼ sec. 32. The Color of Title Act affords title to claimants who have not acquired title directly from or through a series of conveyances originating with the United States. Claimants who can establish that they have held the land under a claim or color of title, and satisfied the other requirements of the Color of Title Act, will be given a patent to the land. If patent had issued, the Estate would have no need to invoke the Color of Title Act. 6/ See Jerome L. Kolstad, 93 IBLA 119, 122 (1986).

If no patent has issued, the Color of Title Act may be applicable. BLM asserts that the record indicates that the United States has never conveyed the SE¼ NW¼ sec. 32 (see Answer at 3), and the Estate has presented no evidence to the contrary. We will therefore consider whether the Estate

5/ The February 1991 letter was signed by Robert R. Sivers as the "Personal Representative" of the Turney Estate. BLM contends that Sivers is not qualified to practice before the Department on behalf of the Turney Estate. See Answer at 1, n.1. An individual may practice as an administrator or "other similar fiduciary" on behalf of a decedent's estate. 43 CFR 1.3(b)(3). In the absence of evidence to the contrary, Sivers' assertion that he is the personal representative of the Turney Estate is sufficient to establish his qualifications to appear on its behalf.

6/ The Estate refers to a conveyance "from the United States of America to Antonio Lucero on 10/24/04." That was the date the General Land Office (GLO) (BLM's predecessor) issued Homestead Certificate No. 890 authorizing conveyance of 120 acres in the W½ NE¼ and NE¼ NE¼ sec. 32 to Lucero. On the same date GLO received additional homestead entry application No. 3016 for the SE¼ NW¼ sec. 32. The Title Company initially believed that patent had been issued for application No. 3016 (See Letter to BLM, dated Jan. 4, 1990). This conclusion was apparently based on ambiguous notations on historical indices indicating a "sale" to Lucero.

qualifies for a patent under the Color of Title Act. The question of "adverse possession" ownership is resolved by application of that Act. 7/

[1] Section 1 of the Color of Title Act authorizes the Secretary of the Interior to issue patent to color-of-title claimants and defines two classes of claims. A Class 2 claim under the Color of Title Act is established if the land has been

> held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of
> title for the period commencing not later than January 1, 1901,
> to the date of application during which time they have paid
> taxes levied on the land by State and local governmental units.

43 U.S.C. § 1068 (1988); see 43 CFR 2450.0-5(b).

It is clear that the Estate would not qualify as a Class 2 claimant. There is no demonstratable claim or color of title originating prior to January 1, 1901. The only possible chain of title was initiated in 1904. Taxes have been paid by the Turneys since 1952. 8/ Therefore, we conclude that BLM properly held that the heirs and assigns of Lucero would not be entitled to patent to the SE¼ NW¼ sec. 32 by reason of a Class 2 claim. See Alvin E. Leukuma, 103 IBLA 302, 306 (1988); Agee S. Broughton, Jr., Trustee, 95 IBLA 343, 344 (1987).

A Class 1 claim is established if the claimant can show that the land has been "held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color to title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation." 43 U.S.C. § 1068 (1988); see 43 CFR 2450.0-5(b). We also find fatal flaws in the Estate's Class 1 claim. BLM gives two reasons for rejecting a Class 1 claim. The first is the Estate's inability to obtain a Class 1 patent because it was precluded from doing so in 1938, when the land ceased to be public land. The second is an apparent lack of evidence of compliance with the substantive requirements of the Color of Title Act.

The land sought by the Estate was originally included in the Northern Ute Indian Reservation by the Act of June 15, 1880, ch. 223, 21 Stat. 199

7/ Colorado's adverse possession statute (Colo. Rev. Stat. § 38-41-109 (1991)) and related decisional law are not applicable to claims of title to public land. A claimant's rights by virtue of adverse possession are determined solely by reference to the Color of Title Act. See Delfino J. Borrego, 113 IBLA 209, 212 (1990). Further, the Color of Title Act must be interpreted under Federal common law. See Hughes v. Washington, 389 U.S. 290, 292-93 (1967). Thus, the Estate's right to the land cannot be determined under Colorado's adverse possession statute.

8/ The Turney's interest in the land was acquired at 1952 tax sale after forfeiture for nonpayment of taxes.

(1879-81). In 1895 it was ceded to the United States by the Southern Ute Tribe of Indians (Ute Tribe), and opened to occupancy and settlement as "public domain" by the Act of February 20, 1895, ch. 113, 28 Stat. 677 (1893-95). Id. at 678. By an "Order of Restoration," dated September 14, 1938, the Acting Secretary of the Interior restored all land in various townships, including T. 33 N., R. 2 W., New Mexico Principal Meridian, Colorado, to the Ute Tribe, subject to any valid existing rights. In its explanation of its conclusion that the land is not public land subject to the Color of Title Act, BLM states that the land is a part of the Southern Ute Indian Reservation.

Section 1 of the Color of Title Act provides for conveyance of "public land," and if the land is not public land, it is not subject to the Color of Title Act. See United States v. Schwarz, 460 F.2d 1365, 1372 (7th Cir. 1972); Wilbur C. Nemitz, 97 IBLA 121, 123-24 (1987); Marlyn Haugen, 63 IBLA 12, 15 (1982) (ceded and restored Indian lands). The land in question was public land in 1904 when Lucero filed his application and was open to entry before the 1938 Secretarial order. However, the land ceased to be public land on September 14, 1938.

The restoration order was subject to "valid existing rights." At the time the land was held under a claim or color of title by Joseph T. Martinez, the successor-in-interest to Thomas Jones who had acquired his interest from Lucero in a December 26, 1904, warranty deed. See Supp. SOR at 1. However, a subsequent event precludes the Estate from claiming entitlement under the Color of Title Act tacking on any valid existing right which may have been held by Martinez in 1938.

The Estate is precluded from claiming through Martinez because the tax foreclosure broke the chain of title from Lucero. When the County conveyed the land to Turney in 1952 a new chain of title was initiated for purposes of satisfying the requirements of the Act. See Middle Rio Grande Conservancy District, 86 IBLA 41, 43 (1985); Russel A. Beaver, 71 I.D. 114, 115 (1964). When title is acquired by tax deed, the holder of the tax deed has no privity with the previous owner. Estate of John C. Brinton, 71 IBLA 160 (1983). The period for holding title for a Class 1 claim under the Color of Title act begins with the holder of a tax deed. Thus, whatever rights the Estate has in the land by virtue of the Color of Title Act date from 1952. This date is subsequent to the restoration of the land to the Ute Tribe. The Estate cannot be considered the successor-in-interest to any rights which pre-date the 1938 restoration, and had no valid existing rights at the time of restoration. The land the Estate seeks was not public land when the Estate initiated its chain of title in 1952, nor has it again become public land since that date. See United States v. Schwarz, supra at 1372; Marlyn Haugen, supra at 15. The Estate is not entitled to a patent under the Color of Title Act by virtue of a Class 1 claim. See id.

We will also briefly consider BLM's second reason for rejection. The Estate would not be entitled to a color-of-title patent unless it

could demonstrate compliance with the Class 1 requirement that "valuable improvements have been placed on [the] land" or that some part of it "has been reduced to cultivation" at the time of application. 43 U.S.C. § 1068 (1988); see John P. Montoya, 113 IBLA 8, 16 (1990), and cases cited therein; Mable M. Farlow (On Reconsideration), 39 IBLA 15, 22, 86 I.D. 22, 25-26 (1979); Arthur Baker, 64 I.D. 87, 91 (1957).

BLM found the land is "unimproved" and "unsuited to agricultural development" because of its steep character, and hence "uncultivated" (Decision at 2). 9/ In response, the Estate claims that there was a
house and some buildings on the land in the 1930's when it was occupied
by Martinez's lessee (Frank Belino), who mined coal from the land. It explains that the buildings fell into disrepair and were burned by the Turneys in the mid-1950's. See Affidavit of Joe P. Enriquez, dated November 1, 1990, appended to Supp. SOR.

The Estate's description of improvements does not establish that valuable improvements were placed on the land existing when the land was found to be owned by the United States. 10/ See John P. Montoya, supra at 16. If the structures erected by Martinez's lessee existed when the Estate's chain of title was initiated in 1952, the Estate's description of them and Turney's action shortly after acquiring title gives rise to the presumption that they were not "valuable improvements" within the meaning of the Color of Title Act. See Benton C. Cavin, 83 IBLA 107, 118 (1984); Virgil H. Menefee, A-30620 (Nov. 23, 1966) at 3. If they could have been constituted to be valuable improvements, they were not present on the land when the land was found to be owned by the United States. There is also no evidence that some part of the land has ever been reduced to cultivation. See Mable M. Farlow (On Reconsideration), supra at 22, 86 I.D. at 25. Thus, we conclude that for this additional reason the Estate has not demonstrated that it holds a valid Class 1 claim under the Color of Title Act. See Alvin E. Leukuma, supra.

Accordingly, we conclude that BLM properly held in its September 1990 decision that the heirs or assigns of Antonio Lucero, including the Estate, are not entitled to a patent to the SE¼ NW¼ sec. 32, T. 33 N., R. 2 W., New Mexico Principal Meridian, Archuleta County, Colorado, under the Color of Title Act.

9/ In the State Director's July 1990 memorandum to the Regional Solicitor the Deputy State Director described the 40-acre parcel as follows: "[It] occupies a very steep, southeasterly facing hillside that was, and is, unsuited to agricultural development and use as contemplated by the homestead laws. It apparently contains no improvements."

10/ Turney's clearing of the dilapidated structures from the land would not suffice as a valuable improvement without evidence that it promotes some objective and enhances the value of the land for that purpose. See Lena A. Warner, 11 IBLA 102, 106 (1973); Ben S. Miller, 55 I.D. 73, 75-76 (1934).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge